

# United States Circuit Court of Appeals

For the Ninth Circuit.

1)	
CENTRAL CALIFORNIA CANNERIES COMPANY, a Corporation,	} <i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	} <i>Respondent.</i>
GRIFFIN & SKELLEY COMPANY, a Corporation,	} <i>Petitioner,</i>
vs.	
DUNKLEY COMPANY, a Corporation,	} <i>Respondent.</i>
J. C. AINSLEY PACKING COMPANY, a Corporation,	} <i>Petitioner,</i>
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ANDERSON-BARNGROVER MANUFACTURING COMPANY, a Corporation,	} <i>Petitioner,</i>
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HUNT BROTHERS COMPANY, a Corporation,	} <i>Petitioner,</i>
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SUNLIT FRUIT COMPANY, a Corporation,	} <i>Petitioner,</i>
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**PETITIONERS' POINTS AND AUTHORITIES ON MOTIONS AND PETITIONS FOR LEAVE TO FILE IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, SECOND DIVISION ORIGINAL BILLS IN THE NATURE OF BILLS OF REVIEW.**

KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENEY,  
*Counsel for Petitioners.*



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No. 3824.

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ORIGINAL BILLS IN THE NATURE OF BILLS OF REVIEW.**

## STATEMENT.

These are motions and petitions for leave to file in the United States District Court at San Francisco, a series of original bills, in the nature of bills of review, for newly discovered evidence, and new matter including the later decisions of district and circuit courts of appeals involving the validity of the patent in issue. The purpose sought is to reopen for the reception of additional proofs, the interlocutory decrees affirmed by this court in *Central California Canneries Co. v. Dunkley Co.*, 247 Fed. 790. These decrees are still purely interlocutory. Eight separate cases are here involved, and a separate motion and petition is made in each case. These cases, however, have always been treated as a single case, and will be so treated here. Precisely the same questions are involved in each of the petitions.

Our position in this matter is two-fold:

First, that under the various rulings of this court, including those upon plaintiffs' petitions for rehearing in the case of *Dunkley Co., et al., v. Pasadena Canning Co., et al.*, the invalidity of the Dunkley patent has already been decreed by this court; and

Second, that in any event plaintiff herein has in subsequent litigations so changed its testimony, and such new evidence has been discovered and produced that the showing made in behalf of the patentee is under the law and the decisions legally insufficient to sustain the validity of the patent.

### Procedure.

There has long existed with the courts and in the profession some confusion as to the proper practice in matters of this kind. This confusion has at last been set at rest by the decision of the Supreme Court in *National Brake and Electric Co. v. Christensen*, 41 Sup. Ct. Rep. 154, 65 L. Ed. . . . , decided January 3, 1921, and the more recent case of *John Simmons Company v. The Grier Brothers Co.*, decided by the Supreme Court February 27, 1922. A case also "upon all fours" is that of *Barber v. Otis Motor Sales Co.*, 271 Fed. 171, decided by the Circuit Court of Appeals for the Second Circuit February 9, 1921. Under these decisions the petitioners have what is technically called the "right to apply by petition" here "for leave to file a bill in the court of original jurisdiction in the nature of a bill of review, setting up the new matter" (*National Brake and Electric Co. v. Christensen, supra*), or may file a "petition for rehearing" and "if an interlocutory decree be involved, a rehearing may be sought at any time before final decree, provided due diligence employed and a revision be otherwise consonant with equity." (*Simmons Company v. Grier Brothers Co., supra*.)

It is interesting to note that the efforts made by the moving parties in the cases above referred to to secure consideration of the new matter in the court below were quite similar to the attempts made by the petitioners here. In each, the decrees under attack were interlocutory.

Petitioners having acted promptly after denial of relief in the lower court, their diligence cannot now be successfully questioned in view of the holdings of the courts in the cases above cited.

NOTE. By the expression "old Dunkley Company," as used herein, is meant the Michigan Canning & Machinery Co., the new name of the Dunkley Co. which was the plaintiff in the suits sought to be reviewed. By the expression "new Dunkley Company" is meant the new corporation organized under this name after the name of the old Dunkley Co. was changed, and to which the old Dunkley Co. assigned the patent. By "Pet." is meant the printed copy of the petitions filed. Reference to the petition will usually be the petition of Hunt Brothers Company, the other petitions for sake of brevity, simply adopting by reference the matters contained in this. By "S. F. Rec." is meant the record on appeal to this court from the original interlocutory decrees here sought to be reviewed. By "L. A. Rec." is meant the record on appeal to this court in the case of *Michigan Canning & Machinery Co. et al., vs. Pasadena Canning Co. et al.* By "Rec. on Appeal" is meant the record on appeal from the order of Judge Van Fleet admitting a new party plaintiff, No. 3824.

### Litigation Over Dunkley Patent.

The history of the litigation over the Dunkley patent may be stated very briefly as follows:

The first suits (being the ones here involved) were brought in the District Court at San Francisco and resulted in interlocutory decrees that the patent was valid and infringed. These decrees were affirmed by this Court (*Central California Canneries Co. v. Dunkley Co.*, 247 Fed. 790). The next suit was brought and tried in the District Court at Los Angeles, and resulted in a decree that the patent was invalid. (*Michigan Canning & Machinery Co., et al., v. Pasadena Canning Co., et al.*, 261 Fed. 203.) This decree was affirmed by this court on the ground of non-infringement. (*Id.* 261 Fed. 386.) Petitions for rehearing were filed and both plaintiffs and defendants pointed out that the record plainly showed that there were two

machines involved, the first of which concededly employed a "peeling jet." On this hearing, Presiding Judge Gilbert stated:

"It occurs to the court that the only question here is whether or not a sentence in the opinion of this court should be corrected or modified, and that matter will be sent to the judge who wrote the opinion of this court on the merits of the case. *We were very firmly of the opinion that the decision of the court below should be affirmed.* The present motion will be denied. It is possible that the sentence in the opinion referred to may be corrected."

The petition was denied. Thereupon a petition to the Supreme Court for *certiorari* was filed by the plaintiffs, in which it was again urged that the Circuit Court of Appeals for the Ninth Circuit had either decided that the first spray device of Grier did not infringe, or that the court had ignored the issue raised as to this device and the evidence thereon. In response to this defendants replied, contending that this court had by its action affirmed the District Court in holding the patent void for anticipation, but if not, then the defendants joined with plaintiffs in their petition to the Supreme Court for *certiorari*, in order that the issues raised in the case might be finally determined in accordance with the proofs submitted. The petition was denied.

The next suit was tried in the District Court at New York, and resulted in a decree for defendant on the ground the patent was invalid and also because



the defendant had a license. *Dunkley Co. v. California Packing Corporation* (277 Fed. 989, <sup>unreported</sup>). This decree was affirmed by the Circuit Court of Appeals for the Second Circuit, the appellate court placing its affirmance on the second ground. (Id. 277, Fed. 796.) These various decisions have been printed in pamphlet form and are filed herein for the convenience of the court.

In the trial of the case at bar, defendants were caught unaware by an unexpected shifting of dates by the Dunkleys from the year 1903 to 1902. Even so, the trial court held under the evidence there presented that "it is a very close question as to which of the two minds, that of Grier or that of Dunkley, the first conception of that idea came. They were very nearly contemporaneous \* \* \*." And this court also pointed out that "the ideas of Grier and the plaintiff may have been contemporaneous," but priority was awarded to Dunkley, credence being given to his story of an earlier reduction to practice. If it was a close question on the record formerly submitted in this case, there should now be no question at all but that the holding should be against Dunkley under the record now submitted in the light of the burden of proof placed upon Dunkley under the decisions of the Supreme Court and the various circuits courts of appeals in similar cases.

## General Considerations Bearing Upon the Underlying Equity of These Applications.

1. There exist conflicting decisions on the Dunkley patent. One court has held it valid. Two courts have held it invalid. As to these petitioners, the patent monopoly holds. As to their competitors, the Southern California canners, the patent is invalid. It is good in one district and bad in another. Some one is being wronged.

2. The new and additional evidence upon which relief is sought carries the approval of two able trial judges—Judges Trippet and Hand. It has been before this court on the appeal from Judge Trippet's decision, and this court has affirmed that decision without qualification. Most of this evidence was presented in open court, and witnesses were extensively cross-examined. It is not fairly comparable to the testimony by affidavit upon which applications like this are commonly founded. (Some of the evidence here presented is in addition to that before Judge Trippet.)

3. Much of this new and additional evidence is of the most unequivocal character. Vital changes of testimony by the two Dunkleys is a matter of record. There is a large amount of documentary proof.

4. There is a curious and peculiar equity here present, in this: This court, in affirming the interlocutory decrees in the cases sought to be reopened, applied the rule of *falsus in uno, falsus in omnibus*, to the testimony of one Stewart Campbell, a witness



of petitioners, and rejected all of his testimony. Strangely enough, the situation is now reversed. The two Dunkleys have changed their testimony, and this in important particulars and under circumstances casting grave suspicion upon their *bona fides* in the trial at San Francisco. Why should not this court apply the same yardstick in measuring their testimony now that it did apply then in measuring the testimony of Stewart Campbell?

5. The evidence upon which this petition is based covers in most minute detail all of the developments at the Dunkley cannery at the little lake town of South Haven, Michigan, during the years of 1902, 1903 and 1904. From this evidence it is possible to reproduce occurrences there literally from day to day. It is utterly impossible to fit the events found by the court below into the picture thus portrayed. Judge Van Fleet, in ruling upon the application to reopen made before him (in addition to entirely misconceiving the rule of law as to the burden of proof), fell into the error of thinking that the decisions of Judges Trippet and Hand depended upon the testimony of Stewart Campbell, a witness whom he was unwilling to believe. The fact of the matter is that if Stewart Campbell had died years ago, the picture would be just as clear. His testimony was quite unessential. The facts to which he testified were proven by the testimony of many other witnesses.

### New Matter Analyzed.

The new matter set up in the petitions herein bears directly upon the date of the alleged Dunkley invention. It may be classified briefly as follows:

1. Subsequent vital changes in testimony by S. J. Dunkley, the alleged inventor, and Melville E. Dunkley, his son, executive officers of both the old and the new Dunkley Company and the main witnesses whose testimony was accepted to carry back the date of the alleged Dunkley invention to a point where it was not anticipated by the Grier invention. For example, in the trial of the case at bar, plaintiff, recognizing the necessity for the introduction of documentary proofs to carry its date back prior to Grier, brought forward a letter from the Clark Engine and Boiler Co., dated April 21, 1903, which referred to a "tank." This the Dunkleys testified was the first lye tank. This letter was also utilized to refresh the memory of the Dunkleys, thus justifying a radical change from testimony given by them in a proceeding in the Patent Office wherein they asserted that their first experimental machine was made in July, 1903. (In order to avoid the effect of the Grier defense, they were under the necessity of shifting their date still farther back to the year 1902.) In later litigations they have been forced to admit that the Clark Engine and Boiler Company letter did not refer to a lye tank at all, but to a *soup tank*, thus eliminating their sole item of documentary proof.

In the trial of the case at bar, they also offered as an excuse for their failure to produce books and rec-

ords, the alleged fact that their factory had burned and the books and records had been destroyed by fire. In later litigations, they have been forced to admit that the books and records were not burned, and that they still have them and their absence is unaccounted for.

In the trial of the case at bar, the existence in 1903 of an elaborate conveyor-table for the *peeling of peaches by hand* was denied, it being asserted that practically all of the peaches were peeled by a large commercial lye peeling machine. In later litigation, this table was admitted by the Dunkleys, a fact, as pointed out by Judge Trippet, inconsistent with plaintiffs' theory. It is inconsistent because if Plaintiffs' Exhibit 10 had been constructed and successfully tried out in 1902 and had been again tried out with a lye tank in July, 1903, and its success assured, the plaintiffs would not, in August, 1903, have set Stewart Campbell at the making of an elaborate and most expensive apparatus designed only for the peeling of peaches by hand. It is also inconsistent with the plaintiffs' theory, because of the physical dimensions of the room and the space which it occupied, as will be hereinafter pointed out.

2. A series of letters passing between S. J. Dunkley and Edwin Norton and O. W. Norton, his financial backers, produced by S. J. Dunkley in the trial of the Los Angeles case to refresh his memory and promptly introduced in evidence by the defendants there. Among many other facts established by these letters, contrary to plaintiffs' contentions, is the important one that the second machine which Dunkley made, his first three-

line commercial machine as distinguished from Plaintiffs' Exhibit 10, an experimental model, was made by Stewart Campbell between the month of November, 1903 (after the peach season of that year), and the peach season of 1904, and was installed by him and used for the first time in the season of 1904. The Dunkleys had testified in the case at bar that only two machines had been constructed prior to November 1, 1904, and in the Pasadena case, although they attempted for a time to inject a third machine they finally gave it up in despair and returned to their San Francisco testimony that there were but two machines all told.

The effect of this is to completely destroy their story as to their operations in 1903, as it is not pretended by them that the little experimental model machine could or did handle any considerable number of peaches. Thus Dunkley, even if we believe his story that Exhibit No. 10 was made in 1902, has let a complete peach season go by without development, and Grier is first under the conceded facts. It is abundantly shown, however, that plaintiff's experimental model machine was made by Stewart Campbell in the fall of 1903 and first tried out in October of that year. That the Dunkley machine was first commercially used in 1904 is conclusively established by these letters. There is no letter or other document of date prior to October 23, 1903, which refers to a lye peeling machine, or any part of it, and the letter of October 23, 1903, undoubtedly has reference to the experimental model machine which Campbell had just completed and tried out. Un-

der the decisions of the courts hereinafter cited, bearing upon the patentee's endeavor to carry back his date of invention prior to his date of application, the Dunkley-Norton letters must be construed most strongly against Dunkley.

3. Certain documentary proofs presented for the first time in the New York case, including the Dunkley payrolls. These payrolls show defendants' witnesses to have been remarkably accurate as to the times of their employment and the nature of their work, and demonstrate the falsity of Dunkley's claim that he peeled practically all of his peaches by the lye machine in the year 1903.

4. Certain evidence discovered by the moving parties here after the trial of both the Los Angeles and New York cases, one item of which is a newspaper article published in a South Haven paper in April, 1904 (supported by the affidavit of its author in regard thereto), describing the Dunkley peach peeling machine as being a new machine "to be used for the first time this season." There is also another newspaper article under date of October 12, 1903, describing minutely the plaintiffs' peeling operations in the Dunkley factory in 1903. The peaches were peeled *by hand* and not by lye. There is also the affidavit of Arthur Norton, vice-president of the Continental Can Co., Baltimore, Maryland, the son of Edwin Norton, financial backer of Dunkley. Arthur Norton represented his father at the Dunkley plant and was intimately familiar with the development of the Dunkley machine.)



5. A large amount of evidence, both oral and documentary, presented in the Los Angeles case and before the court in the New York case.

This new matter will be briefly analyzed hereinafter, and appropriate references given. Much other new evidence and many other important contradictions and modifications could well be included in our brief, but we forego for sake of brevity. The record now comprises many thousands of pages. For a complete analysis of the testimony (with the exception of that adduced in the New York cases), we respectfully refer to pages 1-138 of the Brief of Defendants-Appellees, filed in this court in the case of *Dunkley Co., et al., v. Pasadena Canning Co., et al.*, Equity No. 3316.

**The Proofs in Behalf of Dunkley Are Now Legally Insufficient to Sustain the Patent. Authorities—Including Illustrative and Uniform Decisions of U. S. Supreme Court, Second, Third, Fourth, Sixth, Seventh and Eighth Circuit Courts of Appeals and Various District Courts.**

Dunkley filed his patent application November 29th, 1904. Under the uniform holdings of all the courts, Dunkley is only entitled to the date of *November 29th, 1904*, as the presumptive date of his invention.

It is shown in this case, and it has been previously held by this court (247 Fed. 790, 793), that Grier conceived his anticipating device in the summer of 1902, and completed his reduction of the same to practice in the summer of 1903. The completion of two large commercial machines by Grier and their final installa-

tion in July, 1903, stand conceded. He began the work of actual construction early in April, 1903.

In order for Dunkley to "carry back" the date of his invention beyond November 29th, 1904, and prior to the dates of Grier, it is necessary under the unanimous decisions of the courts that Dunkley prove his prior date of invention by proof of the same character as that required to establish an anticipation, usually designated as "proof beyond a reasonable doubt." *Having established invention by Grier at a date prior to the date of Dunkley the courts uniformly and unanimously hold that the burden has shifted to Dunkley. This burden can only be met by the strictest character of proof.*

As the record in the case at bar is now made up in this proceeding, plaintiff's attempt to "carry back" the date of invention is supported solely by oral testimony. This oral testimony is furnished by the alleged inventor, his son, his sister-in-law and two employees, who are dependent upon him for a living, and all of these witnesses (except one) had previously testified clearly and unequivocally in an interference proceeding in the Patent Office that Dunkley's first experimental device, the brush and spray part of the alleged invention, to-wit, Plaintiff's Exhibit 10 herein, was made in July, 1903—almost one year later than the time now asserted.

Other witnesses called by plaintiff gave immaterial and frivolous testimony. No witness called by plaintiff claims to have made the machines involved here, nor were any of said witnesses employed exclusively in the peeling department of the Dunkley cannery. No



records of purchase of materials for the making of the Dunkley machine, or lye for its operation, in the years 1902 or 1903 were produced by plaintiff, either from its own books or from the books of anyone alleged to have furnished such materials or supplies. Indeed, it is significant to note that plaintiff's witnesses have no memory whatever as to the origin of any of such materials or supplies. Plaintiff's case, as it now stands, is entirely barren of any circumstantial corroboration, either oral or documentary.

An analysis of the testimony of the plaintiff's witnesses, other than the five named, appears at pages 212-247 of the brief of defendants-appellees filed in this court in the case of *Dunkley Company et al. v. Pasadena Canning Company, et al.*, Equity No. 3316, and the testimony of the five witnesses is analyzed at pages 278-338 of said brief. We respectfully refer to this treatment of the record as containing concise excerpts from the testimony sufficient to demonstrate conclusively the inadequacy of plaintiff's showing under the decisions hereinafter cited.

We respectfully refer also to a brief resume of plaintiff's evidence contained at pages 26-42 of a "Memorandum of Defendants' Motion to Re-open," entitled in the case at bar in the District Court and filed herewith. This memorandum, consisting of 117 pages, comprises a carefully prepared digest of the entire record to date, including the interference proceeding in the Patent Office, the case of *Dunkley Company v. California Cannery Company*, 203 In Equity, Northern District of California; *Dunkley Company, et al., v.*

*Pasadena Canning Company, et al.*, 261 Fed. 203, and *Dunkley Company v. California Packing Corporation*, S. D. New York (277 Fed 989 ~~unreported~~), in all of which cases the Dunkleys gave testimony upon crucial points involved here contradictory to their testimony in the case at bar.

Under the unanimous decisions of all the courts, the burden is upon respondent, under the circumstances shown in this case, to affirmatively establish by the most clear, cogent and convincing evidence the date claimed prior to the Grier anticipation.

Our contention is that even ignoring the affirmative testimony adduced here in the impeachment of the Dunkley story, the case made by plaintiff is insufficient under the authorities. Certainly if the mass of oral and documentary proof offered by the defendants is given consideration, the inadequacy of plaintiff's proof under the decisions is inevitable.

For the court's convenience, we include a brief resume of the cases applicable, it being borne in mind that the proof of Dunkley's date of invention rests almost wholly in the testimony of himself and his son. As to such testimony the remarks of the court in *Eck v. Kutz*, 132 Fed. 763, in a case similar to the case at bar, are appropriate:

"But the complainant is a highly interested witness, and his son is not much better; nor does the cam cylinder prove anything by itself, however primitive, being adaptable to whatever date may be assigned to it. The earlier date contended for rests, therefore, upon the mere say-so of the father and son, without any corroboration or convincing circumstances, which hardly fulfills the

high degree of proof required when the date of an invention is material in order to escape anticipation.”

In addition to their natural bias, these witnesses, Dunkley and son, show themselves utterly unreliable when they repeatedly, in answer to questions involving vital matters concerning their machines, take refuge in such expressions as “I could not say” and “I do not remember.” In the brief of defendants-appellees in this court, Equity No. 3316, at pages 292-303, there will be found eleven pages of such answers by these two witnesses, collected from their testimony, with appropriate references to the pages in the record where the same may be found.

In light of the authorities hereinafter cited, it will only be necessary in our opinion for the court to read these eleven pages of testimony to demonstrate that the Dunkleys have not produced that “clear and convincing” proof necessary to carry back the date of their invention prior to an established anticipation.

It will be noted in the cases that follow that in many instances the lower court sustained the patent, only to be reversed by the appellate court upon the very ground urged here. (*Italics*, unless otherwise indicated, are ours.)

THE SUPREME COURT OF THE UNITED STATES lays down the rule in the case of *Clark Thread Co. v. Willimantic Linen Co.*, 35 L. Ed. 521, 140 U. S. 481, that the patentee’s evidence given for the purpose of “carrying back” his date of invention is subject to

the “gravest suspicion.” In that case, the lower court had sustained the patent. Holding that the burden of proof had been shifted to the plaintiff by the introduction of a publication antedating plaintiff’s application, the court adds:

“No person accustomed to weighing the credibility of human testimony can fail to perceive the stress under which this evidence was given.  
\* \* \* We feel bound to put this *strict construction* upon the *patentee’s evidence* because such testimony given for the purpose that this was is naturally subject to the *gravest suspicion*, however honest and well intentioned the witness may be.”

The decree of the lower court was reversed, the Supreme Court holding that the testimony of the patentee did not meet the burden of proof.

The reasons for applying this rule are ably set forth by Judge Coxe in the leading case of *Thayer v. Hart*, 20 Fed. 693.

The court expresses the rule to be applied in language which has been widely quoted and approved in a multitude of later cases.

“This date” (of anticipation) “being fixed, the burden was transferred to the complainant to satisfy the court by proofs as convincing as that required of the defendant that his invention preceded theirs. The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made per-

fect accuracy well nigh impossible, where an event, not deemed important at the time, has been crowded from the memory and obscured by the ever varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it.

“The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal; nothing must be left to speculation or conjecture.”

Indeed, the inducement to falsify is far greater to the patentee than to the anticipator having an unpatented device, for the patentee if successful will be able to exact as a royalty from *all* infringers a sum correspondingly in excess of what any one infringer would have to pay.

In the case of *Thayer v. Hart*, *supra*, a number of witnesses were called by complainant, and the circumstances relied upon by complainant were as follows:

Application for patent was filed December 20, 1877. The date of invention was asserted as of October, 1876. According to complainant's story, during his absence at the Centennial Exhibition in October, 1876, on which occasion his wife and child accompanied him, the firm of Hubbs & Klein left an order with his forewoman for five gross of “Chancellor shields” with pins attached. On his return, in order to avoid the expense of purchasing the pins then in the market, he com-



menced experimenting with a common pin and succeeded in making the patented invention. A shield and pin precisely like the defendant's device, alleged to have been made shortly after this time, was produced in evidence. (Just as Plaintiff's Exhibit No. 10 is produced here.) Later orders were also filled, including one from Anson Pitcher of Boston. The pliers and other tools used in bending and fastening the pins, and a memorandum book of one of the workwomen in which appears an entry in complainant's handwriting under date of October 28, 1876, alleged to refer to the "Chancellor shields" in question, were also exhibited to the court.

(In the case at bar, no documentary evidence of any kind in anywise relating to the issue and bearing date prior to October 23, 1903, is introduced, and the document of October 23, 1903, refers to Dunkley's first experimental machine, which had then just been completed and tried out.)

Additional circumstances alleged are the removal of complainant's place of business from Walker street to Center street, very soon after certain products were turned out. Testimony in behalf of defendants showed uncertainty as to these corroborating circumstances.

Apparently a number of witnesses were called in behalf of complainant, but the court holds, in language peculiarly applicable to the case at bar, that the complainant

"failed to bring himself within the rule adverted to \* \* \* The witnesses were testifying to events which took place six and seven years be-

fore. They certainly are mistaken as to some of them. Why may they not, without any wrongful intent, have mistaken the year also?" \* \* \*

"It is sufficient to say that no one of the principal circumstances relied on by the complainant is free from perplexity. Either its own date is uncertain, or there is difficulty in connecting it with the invention. It would be idle to assert that all this does not create the doubt which the authorities hold must be absent from the mind of the court."

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT lays down the rule that the burden of a patentee who is attempting to carry back his date of invention prior to an established anticipating device is equal to that placed on the anticipator, to-wit, proof "beyond a reasonable doubt."

*Dey Time Register Co. v. W. H. Bundy Recording Co.* (C. C. A., Second Circuit), 178 Fed. 812, was an appeal from a decree dismissing the bill in a suit for infringement of letters patent issued to John and Alexander Dey for improvements in time recorders. The lower court based its dismissal upon non-infringement. The decision of the court of appeals, based upon an entirely different ground (one not urged in the court below), after a review of the entire evidence, is of much stronger import than a mere affirmance of the trial court. Application for patent was filed November 15, 1904; it being shown by record evidence that the International Time Recording Company had shipped



an automatic machine September 12, 1904, the burden shifted to complainant.

Alexander and John Dey, patentees, both testified fully and circumstantially, as did their witnesses, Sanders and Wendel, the mechanics who performed the actual work of perfecting and manufacturing both the hand and the automatic two-color ribbon devices under instructions from John and Alexander Dey. All of these witnesses fixed their dates by various events, such as the arrival of Alexander Dey from Scotland and the removal of their factory in January, 1904. All four witnesses testified in detail and the Court of Appeals characterized their testimony as "entirely honest."

The story of these witnesses was that directions were given by the Deys to the mechanics, Sanders and Wendel, for the building of the two-color ribbon hand-operated device, in August or September, 1903; that work was begun in September, 1903, and that the machine was completed the latter part of October, 1903; that prior to the completion of this machine, instructions were given to Sanders and Wendel for the building of the automatic device in suit, and the same was constructed by them and completed in January, 1904, and that it was shipped out in February or March. There was no direct contradiction of this evidence, and the story as to the automatic device in suit stood substantially unimpaired. Doubt, however, as to the time of the making of the hand-operated machines was created by the introduction in evidence of correspond-

ence of the Dey Time Register Company and the American Type Founders Company. The court thereupon comments:

“It is quite apparent that the witnesses are astray as to the dates when the first or hand-operated machine was perfected, and it is certainly not unreasonable to suppose that the same witnesses, testifying from memory only, may also be astray as to the date when the first Dey automatic shifter was perfected. The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence that *convinces beyond any reasonable doubt*. \* \* \*

“There is nothing in this case to suggest any fabrication or attempted coloring; but the human memory for dates is often inexact, and it is a fair rule which lays the *same burden on either side* which seeks to antedate an occurrence the time of which is established by a trustworthy record. There is no proof that any records of complainant have been lost by fire or other mischance, and, since none are produced to corroborate the contention that it had perfected the automatic ribbon shifter earlier than September 12, 1904, we are of the opinion that the defense of prior public use by some one other than the inventors is established.”

In the case at bar plaintiff claimed that its records had been destroyed by fire, but in subsequent litigations they have admitted that this was not true and that they have possession of the records.

A comparison of the Dey Time case and the case at bar may be helpful:

DEY TIME.

John and Alexander Dey, active heads of complainant's business, principal witnesses for complainants and alleged inventors.

Sanders and Wendel, employees of complainant, corroborate the Deys.

The Deys name the men who made the device in question, Sanders and Wendel.

The testimony of complainant's witnesses not contradicted by the testimony of other employees of complainant.

Complainant's witnesses were mistaken as to the time of making of prior hand - operated machine and therefore held discredited as to time of making automatic machine.

CASE AT BAR.

S. J. Dunkley and son Melville, active heads of complainant's business, principal witnesses for complainant; S. J. Dunkley, alleged inventor.

Schau and Verhage, employees of complainant, are offered to corroborate Dunkleys, but their testimony is contradictory and not in accordance with previous testimony given. The Dunkleys "cannot remember" who made their machine.

Testimony of complainant's witnesses contradicted by scores of witnesses employed by the Dunkleys during the periods of time involved and by those who actually made the machines in question.

The Dunkleys admit false statements as to time of installation of hand peeling table; admit false statement to the effect that the Clarke Engine and Boiler Company letter of

April 21, 1903, referred to a lye tank; admit false statement to the effect that their records were destroyed by fire; have materially changed their testimony as to the percentage of peaches peeled by lye machines in 1903; and have been guilty of numerous other contradictions.

No documentary records produced and their absence not accounted for.

Letters between Rockwell, complainant's sales agent, and the International Company, created a doubt as to the date of making the hand machine.

No documentary records produced and their absence not accounted for.

Correspondence between Dunkley and the Norton brothers, his financial backers, conclusively proves that Dunkley did not make his machine until a year later than the date claimed. (The Dunkleys testified in the case at bar and in subsequent litigation that there were only two machines made, including Plaintiff's Exhibit 10, prior to November 4, 1904. The Dunkley-Norton correspondence shows that the second machine was commenced in November, 1903, and completed in the spring and summer of 1904, and operated for the first time in the summer of 1904, the only other machine being Dunkley's experimental model, Exhibit No. 10 herein. Dunkley either did not make his

model machine prior to the fall of 1903, or there was lack of diligence. *Twentieth Century Machine Co. v. Loew Mfg. Co.*, 243 Fed. 382.)

A remarkably parallel case is the very recent one of *Barber v. Otis Motor Sales Co.*, 271 Fed. 171, C. C. A., Second Circuit, February 9, 1921. Appeal from the District Court for the northern District of New York, from decree for complainant, holding infringement. *Reversed.*

Patent applied for February 24, 1902, issued February 7, 1907, to William Barber. This suit was commenced in May, 1915, and after final hearing a decree was entered for plaintiff, holding infringement (231 Fed. 755), and later affirmed on appeal. (240 Fed. 723.)

Shortly thereafter plaintiff brought suit upon the same patent in the District Court for the Southern District of New York against Reo Motor Car Co. (245 Fed. 938.) At the final hearing, the district judge held the patent void for anticipation and dismissed the bill. No appeal was taken from this decree.

Thereupon, proceedings were had in the District Court for the Northern District of New York and in the Circuit Court of Appeals, for the recall of the mandate and a reopening of the case in the court below. After "further hearing" upon an amended answer setting forth matters not theretofore called to the district judge's attention, the district judge ad-



hered to his previous ruling, decreeing infringement. From this interlocutory decree defendant appealed.

The Circuit Court of Appeals examined the prior art, and held that plaintiff must establish by proof beyond a reasonable doubt his date of invention prior to the dates of certain established anticipations. To thus carry his date back, plaintiff offered his own testimony, corroborated by his wife, the pattern-maker and the iron moulder who aided in making the machine. The Court of Appeals held the proof insufficient as a matter of law, although the story stood apparently undisputed. The court states the rule as follows:

“One who seeks to carry the date of invention back of a date of an anticipating patent assumes the burden of proof, and must establish the earlier date by evidence so cogent as to leave no reasonable doubt in the minds of the court that the transaction occurred substantially as stated. \* \* \* The rule as to the burden cast upon the appellee in endeavoring to fix such a date is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt.”

Some of the points of comparison between the case at bar and Barber v. Otis:

### Facts.

#### BARBER V. OTIS.

Patentee shifted his testimony as to date of his preliminary sketches from 1899 to 1897.

#### CASE AT BAR.

Patentee shifted his testimony as to the making of his first experimental machine from 1903 to 1902.

Barber "gave no satisfactory excuse" for his change in testimony.

Patentee testified in one suit that the State street shop antedated the invention, and in another suit to the contrary.

Barber gave "inconsistent testimony" as to matters used for fixing dates.

Barber's testimony as to the history of his invention

The Dunkleys claimed a refreshment of recollection from a certain letter—now admitted by them to have no bearing whatever.

Melville Dunkley, son of the inventor, and plaintiff's principal witness, testified in the case at bar that records were burned, and in the Pasadena suit admits to the contrary.

The Dunkleys gave inconsistent testimony as to number of machines made, where operated, who may have made them, amount of peaches peeled by lye in 1903, and as to many other important particulars. Melville Dunkley in the case at bar denied the existence of long hand-peeling table in 1903; in subsequent litigations he admits it. A letter dated April 21, 1903, referring to a tank, is introduced in the case at bar, with the assertion that the same referred to a lye tank for use with Dunkley's invention. In later litigations it is admitted that this letter referred not to a lye tank but to a *soup tank*.

The testimony of the Dunkleys upon vital mat-



was apparently clear, detailed and circumstantial.

ters was a succession of "I don't remember" and "I couldn't say."

Wife Testifies.

Son and sister-in-law testify.

Barber gives poverty as reason for not filing application for patent sooner.

Dunkley gives no reason for delay.

Barber introduces testimony of pattern-maker and iron moulder.

Dunkley produces no testimony of materialmen or mechanics; on the contrary, the defendants in the Pasadena and New York cases introduced testimony of mechanics and materialmen showing that patentee's device was made a year later than date claimed.

Testimony in Barber case held insufficient in the absence of impeaching testimony for defendant.

The Dunkley story is of itself insufficient, and self-contradictory; it is utterly destroyed by the testimony of the men who made his machines and of scores of former employees and other reputable witnesses who saw them in construction and operation.

### Remedy.

Appeal from District Court, decreeing infringement, and affirmance by C. C. A.

Appeal from District Court, decreeing infringement, and affirmance by C. C. A.

Subsequent suit in Southern District of New York against another defendant resulting in decree for defendant.

No appeal from decree of dismissal in Southern District. D e c r e e becomes final.

After decree in Southern District in Barber v. Reo had become final, mandate is recalled by Circuit Court of Appeals and rehearing granted by reason of the decree in the Southern District and new matters there shown.

The court below, after rehearing granted, adhered to its former ruling holding infringement.

After a re-hearing in the court below, and a re-ad-

Subsequent suit in Southern District of California against another defendant, resulting in decree for defendant.

Decree in Southern District appealed from and affirmed by Circuit Court of Appeals. *Certiorari* denied by Supreme Court. Decree becomes final.

We are asking a rehearing by reason of the decree in the Southern District and new matters there shown and by reason of this court's affirmance of that decree.

After suggesting that the court had no jurisdiction to entertain the motion, the court below proceeded to hear and deny a motion to reopen "on its merits." (The court was correct in stating that the motion should have been made in this court and not in the court below, in view of more recent decisions of the Supreme Court of the United States.)

This court should grant the petition here upon the

herence of that court to its former ruling decreeing infringement, the Circuit Court of Appeals reversed the lower court on the facts, holding them insufficient to carry the inventor's date back prior to the established anticipation.

See also *Westinghouse Elec. and Mfg. Co. v. Catskill Ill & P. Co.*, C. C. A., Second Circuit, 121 Fed. 831, in which a decree of the lower court holding certain patents issued to Nikola Tesla valid and infringed, was *reversed*, the court stating:

“Complainant has failed to comply with the fundamental rule that the best evidence of which the case is in itself susceptible must be produced.”

Dunkley in the case at bar did not produce any records or account for their absence.

See also *New England Motor Co. v. B. F. Sturtevant Co.* (C. C. A., Second Circuit), 150 Fed. 131, in which the lower court was *reversed* on the ground that the court was “not satisfied that the evidence is sufficient to anticipate the anticipation,” and that “the burden was upon the complainant” to “furnish the court with convincing proof.”

THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, in the case of *Hunnicut Co. v. Gaston Co.*, 218 Fed. 176, reiterates the rule as to the shifting of the burden of proof to the patentee, and remarks the high degree of evidence required. In that case, letters were introduced which were “ambiguous in their ref-

erences; but even if they plainly referred to the double grader now in question" the court held that the patentee would not be entitled to a time prior to their date.

The Dunkley-Norton correspondence in the case at bar, referring to a peeling device, is all of date *after* the Grier use, and therefore insufficient under the authorities. Judge Trippet held that he was convinced "beyond a reasonable doubt" that Dunkley did not make his first machine until the fall of 1903.

The CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, in *National Machine Corp., Inc., v. Benthall Machine Co.*, 241 Fed. 72, *reversed* the lower court upon the ground of the inadequacy of the proofs by complainant to anticipate the anticipation. The Circuit Court of Appeals held that *proof of an established anticipation cannot be overcome by oral testimony*, but that proof beyond a reasonable doubt is required of the patentee.

"If there be added to this (possibility of being mistaken) a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more seriously impaired. This case is an apt illustration of the wisdom of the rule requiring such anticipations to be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court that the transaction occurred substantially as stated.' (*Deering v. Winona*, 155 U. S. 286.)"

"This quotation is very much in point as respects complainant's testimony, inasmuch as the

witness Evans was its foreman, and Cockes testified that he was an agent of the same company.”

In the case at bar, complainant’s witnesses, Schau and Verhage, are still in its employ. The testimony is all oral. In the Benthall case there were other witnesses for complainant, but the showing was held insufficient under the rule.

The CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT has likewise laid down the rule that to carry back the date of an invention plaintiff’s proofs must be established “beyond a reasonable doubt.” In the case of *Columbus Chain Co. v. Standard Chain Co.*, 148 Fed. 622, affirming the decree of the lower court dismissing the bill for infringement, anticipation was shown as of December 27, 1894, to avoid which complainant produced the testimony of Daniel Carroll, the inventor, his brother, Edward Carroll, James Crooks and George N. Mettle, all of whom testified that they had worked upon the device. Both of the Carrolls testified that the punch (device in question for making links of uniform length) was made by Edward Carroll at the direction of the patentee not later than September, 1893. This was a crude device, and a pattern-maker, James Crooks, during the winter of 1893-4, made a pattern. Thereafter, in the summer or fall of 1894, he had George N. Mettle a machinist, plane a channel in a steel punch. Crooks and Mettle testified that they made, the wooden model and did work on the tool respectively in the fall or winter of 1894. Attention is also called to the delay of the patentee in



filing his application, the court stating, "the delay in applying for a patent seems unreasonable."

In the case at bar, according to plaintiff's story, over two years' time was allowed to elapse after the alleged building of the machine and successful try-out. Plaintiff produced no witness who had worked upon the machine, while a large number of witnesses were produced by defendants in the Pasadena and California Packing Corporation cases who either helped to construct the machine or saw it under construction, and who completely impeached the Dunkleys in their testimony as to the date of their alleged invention.

The CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, in the case of *Twentieth Century Machinery Co. v. Loew Mfg. Co.*, 243 Fed. 373, has also expressed the rule as requiring "*unequivocal and convincing proofs*" on the part of complainant.

To avoid established anticipation, patentee endeavored to carry back the date of his invention. In addition to his own recital, he produced a sketch dated February 1, 1902, and the testimony of a draftsman that it was "presented by the inventor to me; this sketch or one similar to it." It does not appear that this testimony was controverted. Also, entries in the books of the patentee's solicitor showing payments to him beginning March 3, 1902, and ending April 2, 1902. All of this evidence was held insufficient corroboration of an earlier date than that of the first application, April 10, 1902.

The anticipating device was unpatented, the court holding that such an anticipation may be shown with



the same effect as a patented one, and can be carried back to the date of its conception, under sections 4886 and 4920 of the Revised Statutes, citing *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation*, 166 Fed. 301 (C. C. A. 1).

See also *Michigan Central R. Co. v. Cons. Car Heating Co.*, 67 Fed. 121 (C. C. A., Sixth Circuit, Judges Taft, Lurton, Severens), in which a decree of the lower court holding infringement was *reversed* on the ground that the patentee had not sustained his burden of proof to show by "clear and unequivocal" evidence that his invention antedated an established anticipation.

The CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT likewise lays down the same rule with reference to the high degree of proof required of the plaintiff under the circumstances here involved. In the case of *Consolidated Ry. Co. v. Adams & Westlake Co.*, 161 Fed. 343, the lower court had held a patent issued to one Kennedy valid and infringed. On appeal to the Circuit Court of Appeals, this decree was *reversed*.

The following excerpts show how strictly the rule under discussion is applied against a patentee:

"While it is true that drawings are introduced on behalf of the patentee, exhibiting the suspension means, with testimony which tends to fix their date, as stated in complainant's brief, 'somewhere between July and the last of October, 1901,' each exhibit rests on the recollection and credibility of witnesses for the alleged date, at best stated indefinitely; \* \* \* An exhibit 'rough sketch,'

in a memorandum book of a witness (Sexton), is introduced, as tending to show disclosure of the patent-device to this witness, by Kennedy, about November 17, 1901. \* \* \* The exhibits referred to, however, are not so authenticated in date, consistently with other facts, that they can be accepted, in our view of the circumstances, as satisfactory confirmation of the testimony of the patentee that he had perfected and communicated the device of his patent, prior to the alleged conception by Sherbondy, which was reduced to practice so long in advance of Kennedy's application.

“\* \* \* nor does it satisfactorily appear from the testimony that any portions of equipment, specially adapted for the device of this patent, were actually made by Kennedy or his company prior to 1902—as the shop orders in evidence are equally referable to the earlier devices. \* \* \*”

Although patentee produced sketches and shop orders which were referable to the alleged invention, the court disregarded them, as they were equally referable to other times and devices. In the case at bar Dunkley produced no shop orders or records of any kind equally or otherwise referable to anything involved in this suit of a date prior to the established date of Grier.

The CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, in the case of *Torrey, et al., v. Hancock*, 184 Fed. 61, in *reversing* the lower court, likewise lays down the rule that the burden is on the complainant to establish a date of invention prior to an anticipation “by satisfactory and convincing proof.” The court holds that proof which is “contradictory, vague and

general” is unsatisfactory. On pages 212-338 of brief of defendants-appellees, on file herein in the case of *Dunkley Co., et al., v. Pasadena Canning Co., et al.*, Eq. 3316, is a detailed analysis of plaintiff’s proofs. To say that these proofs are contradictory, vague and general is expressing the matter mildly.

In the Hancock case the patentee had applied for a patent “about one and one-quarter years after the alleged anticipating device had been put into use.” In the case at bar the anticipation was established a year and a half prior to complainant’s application. In the Hancock case the complainant failed to produce the best evidence obtainable. In the case at bar complainant failed to produce any records, either of its own or of other concerns who furnished parts of the alleged device, or caustic soda, or other supplies for its operation upon a commercial scale, records readily available if their story is true.

Other enlightening decisions by various courts reiterating the universal rule are:

*Wheaton v. Kendall*, 85 Fed. 666, 672, N. D. Calif.

*Corrugated Paper Patent Co. v. Paper Working M. Co.*, 237 Fed. 380.

*Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. L. Co.*, 108 Fed. 221.

*American Graphophone Co. v. Gimbél Brothers*, 234 Fed. 344.

*Amer. Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 70 Fed. 986, holding that “full, unequivocal and

*convincing*” evidence is required of plaintiff. Comment is made upon the fact that the patentee at a time later than his alleged conception remained “absolutely mute so far as any invention or disclosure by him was concerned.” This fact is comparable to the failure of Dunkley to communicate to his financial backers, the Nortons, the alleged fact that he was using a lye peeling machine successfully during the season of 1903.

*Evans v. Associated Automatic Sprinkler Co.*, 229 Fed. 1007. In this case the inventor had a sketch dated 1913 and he endeavored to convince the court that the sketch was made about November 21st, 1912. The court asks, “If he then could not give an earlier date than January, 1913, how can we now find the date was November 21st?” This situation is parallel to the disclosures of Dunkley and his witness in the interference proceedings in 1910, wherein they testified that Dunkley’s first experimental machine was made in July, 1903.

#### **Case at Bar as Now Made Out by New Evidence.**

The story of the alleged Dunkley invention, as made out by evidence discovered and secured since the trial at San Francisco, and independent of all disputed or questioned testimony there, is very briefly and in its more salient features, as follows. (The court will observe that the facts are established independently of Stewart Campbell’s testimony. Before reading this, we suggest that the court read the substance of the Dunkley story as given at San Francisco. It is stated briefly in the petition at pages 14-17.):

In South Haven, Michigan, there were in 1903 and before, two canneries, that of Samuel J. Dunkley and that of William McEwing. The Dunkley cannery was located just north of the railroad tracks. The main factory room ran parallel to the tracks. Originally this room was only 100 feet in length and 32 feet in width. In the winter of 1901-2, the old building was extended 120 feet toward the east. The new part was the same width as the old. In 1903 the office of the cannery was in the basement. The engine room also was there.

NOTE. If references to the record were made for all the testimony to establish the facts here stated, it would unduly lengthen this statement. The greater part of the matter was entirely unquestioned. Generally as to such facts, no references will be attempted, and the references will be confined to facts dealing the most directly with the construction and use of the lye machines. Such references as are made are not intended to be exclusive.

In 1902, peaches had been peeled by women sitting at small tables scattered about this long, narrow factory room. In preparation for the 1903 season, however, a decided change was made in the arrangement for handling peaches. An elaborate conveyor table for the peeling of peaches by hand, 150 feet in length and (with the platform for the seats) about 11 feet in width, with a conveyor belt running along the center, was constructed and installed during the summer of 1903. (L. A. Rec. 2454-7, 2507-8, 1175, 2076, 2109, 2820, 2373, 2775.) Lumber for this table was furnished by the Noud Lumber Co., of South Haven, between July 6 and August 20, 1903. Underneath this table and along each side was a galvanized trough. This was furnished by Miller, of South Haven, on July 23, 1903. (L. A. Rec. 2646, 1448-9.) Along



each side of the table was a platform wide enough to permit of chairs being placed there for women to sit in. About August 20, 1903, William Tiece installed a row of electric lights along the ceiling over this hand-peeling table. (L. A. Rec. 2774-5.) Various witnesses saw the table in course of construction under the general supervision of Stewart Campbell. (L. A. Rec. 2454-7, 2507, 1907-8.) This table was built along the south side of the factory room, commencing at the east end. To the west of the table and substantially as a continuation thereof, there was constructed and installed a table with a moving slat top. This was 60 feet in length, so that the two tables occupied all but a few feet of the entire length of the main factory room.

During the 1903 peach season, the entire pack of peaches was peeled *by hand* by women. Mostly they sat on chairs on either side of this table. As rapidly as they peeled a pan of peaches, it was inspected by one of two or three inspectresses who did nothing else except walk up and down behind the chairs of the women who were doing the peeling and inspect each pan of peaches, and if found satisfactory, emptied the peaches upon the conveyor belt and punched the ticket of the woman who had peeled them. (L. A. Rec. 2507-9, 3184-5, 2074-9, 2183, 2375-7, 2461-3, 1940, 1952-3, 1174, 1228, 2695, 2852-4, 2106, 2817-20, 2216-20, 2777-8, 2342-3, 2001-5, 2032 *et seq.*)

The foregoing improvements in the method of handling peaches in the Dunkley factory in the year 1903, besides being proven by the testimony of many wit-



nesses, were accurately described in an article entitled "Canning Factory Is a Busy Place," which was published on October 1, 1903, in the South Haven Daily Tribune. (Rec. on Appeal, p. 424.) The writer of the article, L. L. Crosthwaite, testified in the trial before Judge Trippet, and with this article to refresh his recollection, described with great detail and definiteness the arrangement of the factory room and the manner in which peaches were handled. (L. A. Rec. 2183 *et seq.*)

No peaches were peeled commercially by the lye process or brush machine in 1903. A large number of women who worked at this long table in 1903, and who, of course, would have noticed the presence of an entirely new method of peeling peaches, so testified before Judge Trippet. Some of these women worked for the Dunkley Company only in 1903. Among them were several extremely intelligent women who were inspectresses during that season. In addition to these women, there were a large number of other employes about the Dunkley factory in 1903 who testified to the same effect. (L. A. Rec. 3189-90, 2460-2, 2473, 1941-4, 1177-8, 2513-4, 2820, 2853-4, 2696, 2080-1, 2183-4, 2195, 2111, 2220, 2227, 2778, 2745, 2335, 2005, 2036-7.)

McEwing peeled peaches in a crude way by lye in 1902 and on. In the summer of 1903, Samuel J. Dunkley talked with his old friend, Van Nostrand, the druggist at South Haven, about the matter, who advised him that the lye peeling of peaches had been practiced in that vicinity as early as 1868. (L. A. Rec. 2330-1.) William Brunker was employed at the Dunkley factory

at South Haven only during the season of 1903. He was seen by various witnesses in the summer of 1903, experimenting with the effects of lye upon peaches. (L. A. Rec. 2377-80, 2791.) Dunkley again talked with Van Nostrand, and gave him to understand that he was going to build a peach-peeling machine, and asked him whether he had a catalogue showing cylindrical brushes. (L. A. Rec. 2341-2.) About August 1, 1903, Stewart Campbell, accompanied by someone else who has never been identified, came to the office of Riddeford Brothers, at Chicago, they being manufacturers and dealers in brushes (L. A. Rec. 1709), and explained to Riddeford, one of the partners, that he was intending to build a machine for the peeling of peaches, and discussed with Riddeford the kind of brushes which would do the work desired. (L. A. Rec. 1715-22.) Brushes were thereupon ordered and purchased by Campbell, the books of Riddeford showing in considerable detail the character of brushes purchased. (L. A. Rec., Def. Ex. 24, 25.) Campbell was seen by various employes about the Dunkley factory during September and October, working on the brush peeling machine, the framework of which was in evidence as Exhibit 10 in the San Francisco case. (L. A. Rec. 2459-60, 2463-4, 2840-1, 2106-8, 2121, 2381-5, 2378-80, 2795, 2336.) This model machine was built in the basement of the Dunkley factory near the engine room. Certain of the pulleys, boxes and gears for this machine were furnished by Edwin B. Mapes, who conducted the only machine shop in South Haven. His account book shows entries for materials furnished for

and work done upon the peach machine, the entries running from September 28 to October 6, 1903. (L. A. Rec., Def. Ex. 34.) Several tests of this machine were seen by various of the employes and other persons. (L. A. Rec. 2467, 2779-80, 2382-3; S. F. Rec. 602-3, 622.)

The Dunkley factory at South Haven was closed about October 29, 1903. (L. A. Rec. 4124.) About November 7, 1903, work was started at Kalamazoo on a new paring machine, as Dunkley wrote Norton to that effect on that date. (L. A. Rec. 4127.) As there were only two machines prior to November 1, 1904, namely, the model experimental machine and the three-line wooden frame commercial machine (S. F. Rec. 449, 500-1, 417; L. A. Rec. 2152-3, 2470-1, 1212, 2745-6, 1475, 1777, 2886, 2895, 2667-9, 2866-7), the new paring machine thus referred to must have been the second machine built, or the three-line commercial machine. A lye tank for this machine was ordered from the Clark Engine & Boiler Works at Kalamazoo, early in January, 1904, and delivered on January 30, 1904. (L. A. Rec. 2660-1.) Work was done for the Dunkley Company on this machine at the instance of Campbell by Buckley, at Kalamazoo (L. A. Rec. 2051), and at Decker's machine shop, work was done on it between March 8, 1904, and April 30, Decker's books showing this fact. (L. A. Rec. 280-3, 3032.) Louis Payne, a pattern-maker, did some pattern work for the machine in the spring of 1904. (L. A. Rec. 3043.) In March or April, the three-line brush machine, with the tank, generally called the "prevaricator" or "An-

anias," was shipped to South Haven (L. A. Rec. 4147), and the complete machine was set up in the main factory room on the south side thereof and toward the east end, the long table having been cut in two (L. A. Rec. 2151-2, 2468-70, 2664-7, 2881, 2842-3, 2956-60, 2387-8, 2781-2), and the easterly end thereof having been moved to the north side of the room. (L. A. Rec. 2667, 2079, 2843, 2859, 2387-8.) Many disinterested witnesses of the highest type testified to seeing the machine being set up at South Haven, and that it was a new machine. Scores of witnesses testified that 1904 witnessed the first commercial use of a lye machine. (L. A. Rec. 2151-4, 2165, 2468-7, 2664-7, 2884-6, 2842-3, 2856-60, 2867, 2387-8, 2823, 2830, 2781-2, 2786, 2804, 1181-2, 1220, 2553, 2079-80, 2092, 2193-4, 2196, 2108, 3060-1, 2745.)

Concurrently with the construction of this three-line wooden frame machine, there was being constructed a pitting machine which was also set up at the South Haven factory, but which apparently was not successful, and some changed designs became necessary.

About the opening of the peach season of 1904, Dunkley and Stewart Campbell had some difficulty, and Campbell left. (L. A. Rec. 2899, 2920.) William Triece thereupon took charge of the operation of the new machine, and continued to have charge of the same throughout the 1904 season. Hetherington, a new man who went to work at the Dunkley factory at about the opening of the peach season of 1904, apparently stepped into Campbell's shoes as head mechanic. He had a good deal to do with taking care

of the machinery. While considerable difficulty was experienced in running the lye machine, a large amount of peeling was done by it in the 1904 season. About October 2, 1904, an employe of Dunkley's patent attorneys at Chicago came to the factory at South Haven and made the drawings of this machine which furnished the basis of the patent application subsequently made. (L. R. Rec. 4166-7, 4068, 1472-3, 1140.)

In the winter of 1904-5, the design of the peach-peeling machine was substantially changed. It was found that a two-line machine was more satisfactory than a three-line; also, experience having shown that the lye would eat up the wooden frame (the three-line wooden frame machine has not been produced in evidence), iron frame machines were devised. (L. A. Rec. 2905; S. F. Rec. 417.) Hetherington, during the winter of 1904-5, had charge of building these new type of iron frame machines. (L. A. Rec. 2892.)

The foregoing is but the very skeleton of the story. An infinite variety of details are shown by the evidence. These details dovetail together in a very remarkable fashion. For illustration, Mapes, who ran the machine shop at South Haven, in identifying parts for the first or model machine furnished by him in the fall of 1903, pointed out that the shaft holes in certain boxes on Exhibit 10 (Ex. 11 in L. A.) must have been enlarged. (L. A. Rec. 2590-2.) Some days later, S. J. Dunkley gave testimony showing that the shaft holes had been enlarged some time after 1903 in connection with certain proposed experiments with the machine. (L. A. Rec. 4189.) The Dunkley-Nor-



ton correspondence, which came to light in the concluding days of the trial and after many witnesses had testified, verified an infinite number of details given by these witnesses. So convincing were the proofs that it is not strange that Judge Trippet, after hearing the witnesses testify, observing their demeanor, and following the fall of the trial, felt convinced "beyond a reasonable doubt" that Dunkley did not build his first machine until the autumn of 1903.

#### **New Matter Set Up in Paragraph IV of the Petition —Its Materiality and Effect.**

Enough has been said to indicate the difficult and somewhat embarrassing situation that confronted the plaintiff in the trial at San Francisco, upon proof being made of the Grier dates and the burden of proof being shifted (by this and other evidence) to the plaintiff to anticipate these dates. In doing this, the plaintiff was very seriously handicapped by the fact that its main witnesses, S. J. Dunkley, the inventor, and M. E. Dunkley, his son, had each testified in 1910 in a proceeding in the Patent Office that the first or model experimental machine had been built in July, 1903. (The lye tank was not involved in the interference proceeding, not being within the issues. All references in that proceeding are to the brush or spray part of the machine, without the lye tank. See Int. Rec. pp. 57, 486-7, 364-6, 419-21, 443-44, 458, 463-7, 475.) Obviously, some *plausible and convincing excuse or explanation* was necessary to justify a departure from



this testimony and the setting back of the date so as to anticipate Grier.

The *effective* explanation made for abandoning the July, 1903, date and fixing the date of this first or model experimental machine as the fall of 1902, is best expressed in the words of John H. Miller, counsel for the plaintiff, in his brief filed in this court on the appeal from the interlocutory decrees here sought to be reopened. Referring to the Dunkley testimony in the Patent Office proceedings and the subsequent change therefrom, he said (See testimony Melville Dunkley, S. F. Rec. 465):

“Since then they have unearthed the Clark letter of April 21, 1903, showing that the lye tank was built in April, 1903, and this letter refreshed their recollection of the transaction so as to enable them to now state that the framework and spray part of the machine had been built before the lye tank, and in following the matter back they now recollect that the framework and spray part were built in 1902. Until this Clark letter was unearthed, the Dunkleys were not sure in their recollection that the framework was built in 1902, although they were sure that it was in existence as early as July, 1903; therefore in the Patent Office proceedings they were justified in fixing the date at least as early as July, 1903. But the Clark letter changed the situation somewhat and proved to them that the lye tank was built in April, 1903, and as the spray part was built and tested without the lye tank, it necessarily was built before April, 1903. In other words, the production of the Clark letter enabled the Dunk-

leys to remember that the spray part of the machine was built in 1902, and that a complete machine was installed with a lye tank added in July, 1903.” (Reply brief of appellee on appeal, S. F. case, pp. 55-6. See also argument before Judge Van Fleet, S. F. Rec. p. 652.)

And this brings us to the first item of new matter, the so-called

### 1. Clark Letter Incident.

This so-called Clark letter was the only “documentary” proof offered by the plaintiff at San Francisco. The testimony given at the San Francisco trial in regard to this letter is referred to in the petition (Pet. pp. 15-6). It is clear, striking and most convincing in character. It must have appealed strongly to the trial judge and to this court on appeal. Mr. Miller was fully justified in the statements he made.

In the Los Angeles trial, however, it developed that Melville E. Dunkley was no longer prepared to say that this letter and the invoice referred to therein had to do with a lye tank. (Pet. pp. 19-20; L. A. Rec. 1283-1288.)

The fact is, as was definitely proven at the Los Angeles trial, that this particular tank covered by the invoice referred to in the Clark letter was not a *lye* tank at all, but was a *soup* tank, and was never at South Haven, but was installed and used at the Kalamazoo factory of the Dunkley Company. (Pet. 47-9. L. A. Rec. pp. 2600-2626. 2453-4, 2472-3, 2485-86.)

Thus the *excuse and explanation* for setting back the date of the construction of this series or model ex-

perimental machine from July, 1903, the date given in 1910, in the Patent Office, to the autumn of 1902, is completely destroyed, and the *only documentary proof of the 1902 date claimed eliminated.*

But this is not all. Obviously, in view of the burden of proof resting upon the plaintiff in carrying back the date of the Dunkley invention to a point some two years prior to the date of the patent application, *documentary proofs* must be offered or their absence must be explained. What of the books and records of the Dunkley Co. showing purchases of lye or parts for the lye machine? Why these were not produced was also stated by Mr. Miller in his brief in this court as follows:

“Another criticism made against the Dunkleys is that they produced no written records. But counsel seem to have overlooked the testimony given by M. E. Dunkley at page 445 of the record, to the effect that in 1912 the Dunkley cannery was destroyed by fire and their records were lost.” (Reply brief of appellee on appeal, p. 59.)

This brings us to the second item of new matter:

## 2. Books and Records Not Destroyed.

The testimony given at San Francisco in explanation of the non-production of books and records is referred to in the petition (Pet. 16). It is direct and unequivocal (S. F. Rec. 444-5). Again Mr. Miller was fully justified.

No longer, however, is this claim as to destruction of books and records made. At the Los Angeles trial

it was completely abandoned. It was expressly stipulated that all of the old books and records of the original Dunkley Company were delivered to the San Francisco plaintiff in 1910. No longer was it claimed that any records were burned when the factory at South Haven burned in 1912. An *unexplained* failure to produce these books and records at the San Francisco trial would have weakened the plaintiff's case there in a very substantial way, and would have been a powerful circumstance weighing against the accuracy of the somewhat startling testimony of the two Dunkleys there. Grier's books had shown purchases of lye and of parts for his machine. The Dunkley books, if produced, would undoubtedly have shown the same—but of what date?

*It was not incumbent on the petitioners herein to prove at the trial that Dunkley invented his machine after Grier; it was for the plaintiff there, by clear and direct and convincing proof, to establish that Dunkley was before Grier.*

The descriptions already given of the long hand-peeling table constructed and installed in the summer of 1903, and of its use during the 1903 canning season, will give an idea of its significance. Of this apparatus, Judge Trippet states (261 Fed. 207):

“The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of the plaintiffs' case.”

The *sine qua non* of plaintiff's theory is that nearly all of the peaches in 1903 at South Haven were peeled

by lye machine. And this brings us to the third item of new matter, the so-called

### 3. Long Table Episode.

Judge Trippet continues:

“The plaintiffs claim that a complete and perfect machine, namely, the second machine, was operated during the peach season of 1903, where this long table stood. Plaintiffs further claim that practically all the peaches of the season of 1903 were peeled by the second machine. Several photographs, which witnesses testify were taken in 1903, are in evidence. One of the photographs is this particular long table, with the women sitting at it peeling peaches by hand machines and knives. The photograph of the peaches on the table shows that the peaches were peeled by a knife or hand machine, which made little ridges around the peach. When a peach is peeled by lye, it is perfectly smooth, and such ridges do not appear. This is inconsistent with the theory of plaintiffs’ case. One of these photographs contains a picture of a singular circumstance, tending to show that the picture was taken in 1903. This circumstance is that the picture itself shows a bouquet, containing the date of a party held by the employes of the factory in 1903. There can be no doubt in anyone’s mind but what that picture was taken in 1903. It shows many of the same people that sat at the long table peeling peaches by hand during that year.”

It may be added that at least three of the women in the picture shown to be peeling peaches by hand were proven by the Dunkley payrolls and other docu-



mentary proofs to have worked at the Dunkley factory in 1903 *only*.

The photograph (L. A. Rec., Defendants' Exhibit 3-A) and the testimony further show that this long table with the platforms for seats occupied one-half of the entire floor space of the peeling room. This room was only thirty-two feet wide, and allowing space for the row of support posts down the center, there was left but an aisle not occupied by this table of approximately fifteen feet only, a portion of which was required for the trucking of the fruit to the peelers. Anyone who has seen a canning factory of that period will realize that the remainder of the space was required for fruit, boxes, paraphernalia, etc., as testified to by many witnesses. That a lye peeling machine of either commercial or experimental proportions could have been installed in the aisle referred to in immediate proximity to all of these women shown in the photograph and not one of them be cognizant of it, exceeds absurdity. In the interference proceeding the Dunkleys claim that all of their peaches were peeled by a lye peeling machine in 1903; in the case at bar, it was claimed that seventy-five per cent were so peeled; and in the Los Angeles case a "large percentage." The smallest estimate given by any of their witnesses in the Los Angeles case was fifty per cent. Could it be possible that as many peaches could be run through a lye peeling machine located in the same narrow room and immediately next all these women shown in the picture and be totally unobserved by any of them? It will be noted that the ceiling is very low—



only eight feet high, according to the witnesses. Is it possible that a lye peeling device which employs boiling caustic and which emits clouds of pungent steam, could have been operated alongside of these women and every one of them be totally oblivious to it? Not a single one of these women was produced as a witness for Dunkley; on the other hand, a large number of them appeared and testified that no such machine was operated there in 1903, and that they saw no such machine.

In the San Francisco trial, S. J. Dunkley's testimony in regard to the long hand-peeling table was evasive. (S. F. Rec. 491.) Melville Dunkley, however, who was the principal witness there, flatly denied its existence in 1903, placed it in 1904 and described it as an inspection table and pictured it to conform to the half of the long table as it was finally readjusted and actually used in 1904. (Pet. 17.)

"A. The peeling table, according to my best belief, was not put in until 1904. \* \* \*

Q. How long was this peeling table?

A. It was not a peeling table, it was an inspection table.

The Court: The witness has stated that twice, that it was not a peeling table, as you have described it, but it was placed there in 1904 and had an endless conveyor on it and was for inspection purposes. He said no peaches were ever peeled on it." (S. F. Rec. 443, 452, 454.)

Stewart Campbell testified it was constructed and used in 1903, but his testimony was rejected. Hence the date of the table stood as 1904.

At the Los Angeles trial, each of the Dunkleys definitely admitted the existence, location and use of this long table in 1903, substantially as hereinbefore outlined.

The picture also shows this hand-peeling apparatus to have an elaborate, expensive and permanent installation. If the story of Dunkley be true, that Plaintiffs' Exhibit 10 was made and tried out on late peaches in 1902, and a lyeing machine of commercial proportions was made in the spring of 1903, showing Dunkley's faith in his alleged invention, how did it happen that Dunkley installed this elaborate conveyor table for peeling by hand as late as August in that year? The admissions which the Dunkleys have been forced to make in court since the trial are "utterly inconsistent" with plaintiffs' theory.

Perhaps the effect of the foregoing changes in testimony by the Dunkleys may best be illustrated by imagining the suppositional situation of one of Your Honors having been the trial judge at San Francisco, and, after having listened to the testimony and been somewhat troubled by the question of the dates as between Grier and Dunkley, concluded that on the whole case the plaintiff there had sustained the burden of proof, and had notified counsel and the parties to be present for the oral announcement of the decision, and that thereupon Melville E. Dunkley had arisen in the court room and addressed Your Honor somewhat as follows:

"Your Honor, I have been thinking over my testimony. You will remember what I testified

to about the Clark letter of April 21, 1903, and how it referred to a lye tank which was for the first machine, and refreshed my memory and enabled me to say that the 1903 date of the construction of the first machine which I gave when I testified before the Patent Office was wrong, and that, as a matter of fact, the first machine was built nearly a year earlier. Well, I am not sure that that letter and the invoice referred to in it had reference to a lye tank. The invoice may have been for something else—perhaps a soup tank.”

“Another matter, I was mistaken about our books having been burned when the factory burned in 1912. I cannot say there were any books or records in the factory at that time. I know we did have all the books and records in January, 1910.

“I also think Your Honor should know that I was all wrong about that long hand-peeling table which I said was an inspection table and was not built until 1904. That long table was built in 1903, and was a hand-peeling table, and women in 1903 sat along each side of it peeling peaches by hand. That is what it was built for. But I still insist that practically all of the peaches in 1903 at South Haven were peeled by lye machine.”

And then suppose S. J. Dunkley had arisen in court and addressed Your Honor somewhat as follows:

“I remember now about that long hand-peeling table being built in 1903. It, together with a slat or filling table, which was a continuation of it, occupied all but about ten feet of the entire length

of the main factory room. Women did sit along each side of it in 1903 peeling peaches by hand. I still insist, however, that a substantial part of the peaches peeled in 1903 were peeled by lye machine. I also remember about our having all of the old books and records in January, 1910.”

We respectfully submit that in this suppositional case any one of Your Honors would have been a good deal disgusted, and very promptly would have said that with the burden of proof resting on the plaintiff to antedate Grier, in view of the occurrences which had just taken place, you were unable to find that plaintiff had succeeded in sustaining the burden resting upon it.

But this is by no means all. To grasp the full force of the situation here presented, we should add to this suppositional situation that S. J. Dunkley had further addressed the court somewhat as follows:

“I think perhaps I should also tell Your Honor that I have succeeded in digging up a lot of letters which passed between Edwin Norton and O. W. Norton, my financial backers, and myself during the years 1902, 1903 and 1904. I got these letters from stacks of letters in the basement. I have not brought all of them here, but I have brought some of them.”

Continuing these suppositional occurrences, we should then have counsel for the defendant promptly asking permission to consider these letters as in evidence, and asking for a reasonable opportunity to examine them, and calling to Your Honor’s attention some of their salient features.

And this brings us to a consideration of these letters which both Judges Trippet and Hand concluded were entirely inconsistent with the Dunkley claim that the first model machine was built and tried out in the fall of 1902, and that the second machine built, being the three-line or commercial machine, was built in August or September, 1903, and that nearly all of the 1903 pack was peeled by lye machine.

#### 4. Dunkley-Norton Letters.

In order fully to appreciate the significance and importance of these numerous letters running over a period of some three years, they should be considered in detail and in connection with the full story of the Dunkley invention as disclosed in the Los Angeles trial. They appeared at the very close of the trial there at Los Angeles. They verified countless episodes and details related by the more than forty witnesses who had testified on the date of the Dunkley invention. These letters have been considered in this way before this court on the appeal of *Michigan Canning & Machinery Co., et al., v. Pasadena Canning Co., et al.*, Equity No. 3316, both in the oral argument and in the briefs on file.

Here we will endeavor to consider them as though merely superimposed upon the case made by the plaintiff at the San Francisco trial.

Preliminarily we call attention to the significant omissions in the chain of correspondence. The letters actually produced seem to have been carefully selected to cover periods of time much less critical than the



periods as to which no letters were produced. Frankness with the court and a true desire to reach the truth in regard to the date of the alleged Dunkley invention would seem to have called for the production of all the correspondence. There is, for instance, a complete blank in the correspondence for the critical time of July, August and September, 1903. The only explanation at any time ventured by counsel as to this significant omission was made in a reply brief filed in the New York case and was in the following language:

“There would not be any letter describing the peach-peeling machine prior to October 23, 1903, because the thing was in process of development and try-out, and the cannery was crowded to its full capacity, and people were working nights.”

The explanation is not very convincing in view of the infinite detail with which Dunkley related everything done in the factory. The facts conceded are in substance what petitioners claimed at San Francisco and as we now know them to have been. If accepted, there is nothing more to the litigation. Grier was first.

Again, in letters actually produced, there are references to other letters which it would seem probable would throw light upon the situation, but which were not produced. All this is quite significant, in view of the non-production of the books and records, coupled with the attempt made at San Francisco to lead the court to believe that the books and records had been burned.

Taking up these letters, we direct attention to the fact that neither of the two Dunkleys at the San Francisco trial could say that more than the two machines, the first or experimental model, one-line, wooden-frame machine, and the second or three-line, wooden-frame, commercial machine had been built prior to November 1, 1904. (See Pet. 15.) Certainly there is nothing in the testimony at the San Francisco trial which would justify the court in saying that there were other machines which had been constructed. (At the Los Angeles trial it was proven affirmatively that there were only these two machines, and we now have the affidavits of witnesses Augensen, mechanical expert for American Can Company, who was in 1904 assigned to the Dunkley factory and took careful note of the peeling machine being installed at that time; Brown, superintendent for Dunkley; Stewart Campbell, who made the machine; Geiger, who made the drawings for the patent attorneys from the machine itself; Harold, who installed the water pipes to supply the machine, and worked in the factory in 1904; Hetherington, who had charge of the operation of the machine after Campbell left; Newton, who was employed in the factory; Norton, vice-president Continental Can Company, the son of the financial backer of Dunkley, and his representative in Dunkley's factory; Robinson, factory manager Continental Can Company, formerly employed in experimental department of American Can Company and assigned to Dunkley factory in 1904; and Triece, who operated the machine during the season of 1904—all to the effect that the photographs introduced

in the Dunkley-Beekhuis interference proceeding as "Dunkley's Exhibit No. 2, Photograph 1 of *Second Machine*," "Dunkley's Exhibit No. 2, Photograph 2 of *Second Machine*," and "Dunkley's Exhibit No. 2, Photograph 3 of *Second Machine*," respectively, copies of which appear herein at pages 476, 477 and 478 of the appeal record, and which were asserted by Dunkley in the interference proceeding to represent the *second machine* built by him, are photographs of the machine which was first installed in 1904 and first used during the peach season of that year.)

Having in mind, then, that there were but these two machines, we direct attention to the following letters:

On October 29, 1903, S. J. Dunkley wrote from Kalamazoo to Mr. Edwin Norton that

"The South Haven factory is now closed up."  
(L. A. Rec. 4124.)

In November 7, 1903, S. J. Dunkley wrote from Kalamazoo to O. W. Norton that

"We are now busy working on a NEW paring machine." (L. A. Rec.)

Subsequent letters carry along the construction of this "NEW paring machine," sometimes termed the "Rotaries," and the lye tank therefor, which is sometimes termed in the correspondence the "prevaricator" or "Ananias," through the winter of 1903-4, and the shipment of the machine and tank in the spring of 1904 to South Haven, and its trial and installation at South Haven, and its use through the 1904 season at South Haven.

To which of the two machines constructed prior to November 1, 1904, did this correspondence refer?

Obviously the second machine built, to-wit, the three-line, commercial wooden-frame machine. Both sides at the San Francisco trial claimed that the first machine built, to-wit, the model experimental machine, had been built prior to October 29. The Dunkleys said it was built and tried out in the fall of 1902. Campbell testified it was built in August, September and October, 1903, and successfully tried out on late peaches. Hence the "new paring machine" upon which they were busily working at Kalamazoo on November 7, 1903, could not have been this first machine. It must have been the second.

These letters show, then, that the second machine was not built and used during the 1903 peach season, as testified to by the Dunkleys at San Francisco, but on the contrary, its first use occurred during the 1904 season.

The framework of the model experimental machine is in evidence and before the court (Exhibit 10). The woodwork shows no trace of being eaten by lye. Lye destroys the woodwork. As Melville Dunkley testified at the San Francisco trial,

"The slop from the caustic soda getting on this wood cut it out, ate it up very rapidly, so that we started in the fall of 1904 \* \* \* and redesigned the machines, using cast iron for a framework." (S. F. Rec. 417.)

It is quite incredible, then, that the Dunkleys were correct in San Francisco in saying that at least 75%

of the pack in 1903 was peeled by lye machine. The commercial machine was not built at that time. Such extensive use of the model machine would have left unmistakable physical indications of its use.

But the Dunkley-Norton correspondence makes it clear that there was no commercial use of a lye peeling machine in 1903, but that the first use was in 1904, and that even this use was considered as experimental.

For instance, on March 23, 1904, Edwin Norton wrote to S. J. Dunkley in part as follows:

\* \* \* "Cranwell says we should be able to sell all the cheaper grades we can pack, and if our machines for peeling and pitting are successful, which we can be sure about, before the season opens, by getting southern peaches early. Then I hope we can just make a great pack this season and make up for lost time. \* \* \* Have you had any drawings or photos of the 'Annias' Prevaricator and the Pitter? I would like to see what they are like. When you get them set up I will come and see the machines." (L. A. Rec. 4140-41.)

Shortly thereafter and on June 8, 1904, Edwin Norton wrote S. J. Dunkley and said:

"As the market here is full of Early Peaches, I suppose you will soon be able to secure a sufficient supply *to make a real test* of our 'Annnias' and the Pitting Machine. I consider this most important, so that if it is going to do our work well, we may know of it, in ample time, and arrange to do a very large pack, which *we could not probably do at the price we would have to pay*



*for labor under the old system.”* (L. A. Rec. 4153.)

On August 19, 1904, S. J. Dunkley wrote Edwin Norton:

“the prevaricator has been tested and is all right as well as the rotarys.” (L. A. Rec. 4161.)

On September 17, 1904, S. J. Dunkley wrote O. W. Norton in part as follows:

“The peeler works fine.” (L. A. Rec. 4164.)

On September 22, 1904, S. J. Dunkley wrote O. W. Norton and said:

“The peeling machine is running fine so are the rotaries.” L. A. Rec. 4165.)

Again in the same letter he says:

“The Lye machine takes \$2.00 worth of lye for 300 bushel of peaches, so it is not very expensive.” (L. A. Rec. 4166.)

It is absurd, of course, to think that references of this kind would be made if 75% of the 1903 pack had been handled by this very machine. The cost of lye would surely have been an old story to Dunkley’s financial advisers, if the lye machine had been used commercially in 1903 in the manner testified to in San Francisco.

These letters are significant in another aspect. This court, in its opinion ordering the affirmance of the interlocutory decrees in the San Francisco case, said:

“But accepting Campbell’s testimony as true in those particulars wherein he is corroborated by

other witnesses, we find he worked for Dunkley on a machine of some kind in 1903, but this does not identify the machine as the one Dunkley claims to have invented in 1902.”

Brunker and Mapes were the only other witnesses besides Campbell who were called. Brunker admittedly was at South Haven only during the 1903 season. Mapes’ books show entries for work done on the peach machine between September 28 and October 6, 1903. Hence as the second machine was not started until about November 7, 1903, and this at Kalamazoo, their testimony and the entries in Mapes’ books could have been referable to no other machine than the model or first experimental machine.

Three of the letters in this correspondence are urged by counsel for the Dunkley Company as corroborating the Dunkleys’ contentions.

The first of these is the letter of October 23, 1903, from Edwin Norton to S. J. Dunkley, which contains this statement:

“Their description of the perfect working of the peeling and grading machines for peaches are very interesting, and I am very glad with all the new things we have had on hand, this season, that all have worked out so successfully.” (L. A. Rec. 4122-3.)

The reference in the quoted paragraph to “*their* description” refers to Arthur W. Norton, son of Edwin Norton, and Melville E. Dunkley. It seems that at the close of the peach season, Melville accompanied young

Norton to New York for a visit with the latter's father, Edwin Norton.

If this letter had been written in 1902 instead of in 1903, it would have sustained the Dunkley story. As it is, it merely fits in with the contentions at all times made by the petitioners here (and the defendants in the subsequent cases), to the effect that the model machine was constructed during August, September and October, 1903, and was successfully tried out late in the season. Indeed, how else could Dunkley have expressed himself to inform Norton of the successful try-out of the first brush machine?

(Since these letters have come to light, they have been gone over by Mr. Arthur W. Norton, who is now vice-president of the Continental Can Co., and he is able to remember the sequence of events occurring at the South Haven factory. His affidavit is present and will be subsequently considered. At this point it is enough to call attention to the fact that he states in his affidavit that the peeling machine to which reference is made in this quotation was the model or experimental machine built during the 1903 season and which was successfully tried out on late peaches that year.)

The next letter urged as corroborating the Dunkley story is that of October 29, 1903, and is from S. J. Dunkley to Edwin Norton and is in part as follows:

"The South Haven factory is now closed up, and we have been working this last week on a Peach pitter and Mr. Campbell has already got out the working parts. and I think we have it so that

it will halve and pit the Peaches nicely and quickly from the peeler. I note by last week's Canner and Packer that there is a patent applied for a peeling machine for some one in California and on studying it over, it seems to be just a conveyor belt carrying the Peaches running between two tanks of lye with large adjustment wings to slide the Peaches into and out of the tanks on each side, the tanks being built in sections. I would like to cover our machines with patents and talked it over with Mr. Adcock when I was in Chicago last week and he thought the peeling device was patentable and the pitter certainly is, at least it looks that way." (L. A. Rec. 4124-5.)

There is, of course, nothing here in any respect inconsistent with the contentions at all times made in opposition to the Dunkley story. When this letter was written, the model experimental machine had been built and tested out. The pitting machine, as shown by the letter, was being built. Had the peeling machine, as claimed by the Dunkleys, been built and tried out in the fall of 1902, it is, indeed, surprising that S. J. Dunkley, who was accustomed to cover his new machinery by patents, delayed for a whole year taking the matter up with his patent attorney.

*Barber v. Otis Motor Sales Co.*, 271 Fed. 171.

*Amer. Sulphite Pulp Co. v. Howland Falls P. Co.*, 70 Fed. 986.

It will be observed that he was acting with great promptness in regard to the pitting machine.

The next letter relied upon is that of February 10, 1904, from S. J. Dunkley to Edwin Norton, and contains the following:

“In regard to the labor, we have figured that over carefully, and would say, we have the lye machine now nearly completed with the rotary cleaner attached. This machine Mr. Campbell calls the ‘Prevaricator.’ This we are sure will work as we worked the same thing last year, and there is no question about it.” (L. A. Rec. 4129.)

There is no question but what the model experimental machine was fully tested late in the 1903 peach season, and worked successfully. There is nothing of a very complicated nature about this machine. Grier, it will be remembered, did not even bother to make a small machine to prove out his conception, but started in at once and built two full size commercial machines, both of which were put into immediate commercial use. A reading of the entire correspondence will indicate that Dunkley displayed a good deal of the promoter’s optimism and exaggerated style, while the Nortons, the moneyed men of the concern, were more conservative and insisted upon tests and try-outs being made, before going too strongly on the strength of the success of new methods. (As to the effect of ambiguous documents submitted for the purpose of carrying back the date of invention, see *Hunnicut Co. v. Gaston Co.*, 218 Fed. 176, C. C. A. 3; *Twentieth Century Mchy. Co. v. Loew*, 243 Fed. 373, C. C. A. 6;



*Consolidated Ry. Co. v. Adams & Westlake Co.*, 161 Fed. 343, C. C. A. 7; *Thayer v. Hart*, 20 Fed. 693.)

Referring back to our suppositional situation, could any of Your Honors, in view of the irreconcilable differences between the facts set forth in this contemporaneous correspondence and the facts as testified to by the two Dunkleys from memory only, after a lapse of thirteen or fourteen years, have accepted their bare recollections, under the somewhat extraordinary circumstances here disclosed, as measuring up to the strict character of the proof required of them under the rule?

In the trial of the New York case, the new Dunkley Company, the plaintiff there, in an effort to attack one witness offered by the defendants at Los Angeles, produced and identified the Dunkley Company payrolls for the years 1902, 1903 and 1904. These, when critically examined, tell a very interesting story and one entirely inconsistent with the one told by the Dunkleys at San Francisco.

### 5. Dunkley Payrolls.

It will be remembered that at the San Francisco trial the Dunkleys testified that in 1902 peaches were peeled by hand by women sitting about small tables. (This fact is correct. It is so testified by all witnesses at all trials.) Melville Dunkley, however, testified at San Francisco that the only hand-peeling done in 1903 was by women sitting about small tables just as in 1902, and that there were but ten or fifteen or twenty

of them (S. F. Rec. 425), and that 75% of the 1903 pack was peeled by lye machine. The hand-peelers were piece workers. Other employees were generally paid by the hour.

Having in view this testimony by the Dunkleys in San Francisco, it would be expected, if their testimony is true, that the payrolls would show a large number of piece workers for 1902 and a decided drop in the number of piece workers (women hand-peelers) for 1903 and 1904. On the other hand, if petitioners' claim that the Dunkleys were antedating their story by one year is correct, we would expect these payrolls to show a large number of piece workers in 1902, about the same number in 1903, and a drop in the number of piece workers in 1904. What do they show?

The main peach season started about the middle of September. Starting then for each year with the week the major portion of which was after September 15, and each week thereafter until what is estimated to be about the end of the peach season, we have the following:

1902		No. of	No. of
Week Ending		Time Workers	Piece Workers
Sept. 20		159	104
" 27		171	89
Oct. 4		155	101
" 11		157	91
" 15		33	36
" 18		54	...
	Total	729	421
	Average	121	70

1903			
Week Ending		Time Workers	Piece Workers
Sept. 19		116	108
" 26		105	123
Oct. 3		103	94
" 10		67	75
" 17		41	58
" 21		18	26
	Total	450	484
	Average	75	80

1904			
Week Ending		Time Workers	Piece Workers
Sept. 24		187	21
Oct 1		223	9
" 8		226	7
" 15		260	23
" 22		256	1
	Total	1192	61
	Average	238	12

There appears in the record of new matter before the court a rather curious verification of the figures here given. On October 1, 1903, there appeared in the South Haven Daily Tribune, a newspaper article

entitled "Canning Factory Is a Busy Place." L. L. Crosthwaite wrote the article after a personal inspection of the factory. This article states that

"About 160 persons, mostly women, are engaged in the canning departments and 60 in the other departments. The parers work by the bushel, but all other women work by the hour. Women receive 10c to 12c per hour and men 15c to 17½c per hour. Many work extra time in order to make larger wages." (Rec. on Appeal, 424.)

Again, we find the "ten or fifteen or twenty women" which Melville Dunkley at San Francisco testified were peeling peaches by hand at small tables in 1903, not in 1903 but in 1904, the payrolls showing there were approximately this number of piece workers in 1904, while the number of piece workers in 1903 was greater even than it was in 1902.

We reproduce portions of this article here for the convenience of the court, the photograph appearing at Appeal Rec. 424 being considerably reduced in size.

#### "CANNING FACTORY IS A BUSY PLACE

"One of the busiest places in South Haven at the present time is the canning factory of the Dunkley Co., which is now canning and pickling about 600 bushels of peaches per day.

"The various operations through which the fruit passes from the tree in Michigan to the table in the east, west or far north would make a long story,"

\* \* \*

"The peaches are received from the growers, wagons on a long platform along the north side of the building" \* \* \*

“Mr. Wm. Brunker, who has charge of the preserving department, has done a great deal of experimenting in order to make a successful pickled peach in large quantities, and he is now turning out 150 to 200 bushers per day” \* \* \*

“The fruit to be canned is carried in crates which hold one bushel each to the women who do the paring and pitting, who sit at two long tables between which passes a slowly moving belt, about twelve inches wide. The women pare with machines or by hand, some who are very expert preferring to pare by hand as they receive 30 cents per bushel, while the machine workers receive 20 cents for firsts and 25 cents for seconds.” (Note: The “machines” referred to are the little rotary hand-machines shown in the long table picture, Defendants’ Exhibit 3a, L. A. Rec.)

“The peaches being pared and pitted are then inspected by two women who, if the fruit is all right, turn it on the belt and it is carried toward the canners. As the half peaches leave the belt they are washed by an automatic washer and fall on a slatted carrier about three feet wide, which carries them for some distance through a steaming apparatus. Coming from this the fruit is put in cans, which are filled tight, then go to the syrup fillers, after which they go to the vacuum machine. Five cans are put in the machine, after the lids are laid on, and all the air is extracted from them, after which a presser comes down and the lids are forced into place.” \* \* \*

“After leaving the seamer the cans are put on an endless carrier, which takes them through boiling water” \* \* \*

“About 160 persons, mostly women, are engaged in the canning department, and 60 in the other departments. The parers work by the bushel, but all other



women work by the hour. Women receive 10c to 12c per hour and men 15 to 17½c per hour. Many work extra time in order to make larger wages." \* \* \*

"Besides the tin cans, of which they turn out about 425 cases per day, they are putting up a great deal of choice fruit, peaches, pears, plums, etc., in glass."

"The company has a dormitory which accommodates about 75 women, and a dining hall which feeds from 75 to 100. The rates are made reasonable and many who come from a distance avail themselves of them, but a very large proportion of the help are residents of South Haven."

We next direct the court's attention to the newspaper article appearing in the South Haven Weekly Tribune-Messenger of April 22, 1904, as a reprint from the South Haven Daily Tribune of April 19, 1904.

## 6. Newspaper Article of April 22, 1904.

This article is entitled "Improvements to Canning Factory," and is set forth in full at page 33 of the petition. It is appropriately verified by L. L. Crosthwaite, the reporter who wrote the same, and whose recollection is that the information upon which the same was based was given to him by S. J. Dunkley. No denial or correction of this article appears in any subsequent issue of said paper. S. J. Dunkley apparently read all of the local items affecting the factory (L. A. Rec. 1455), and was himself a stockholder in the South Haven Tribune (L. A. Rec. 1737). It is incredible that an article like this stating that the new peeling machine was to be used for the first time in the 1904 season could have gone unchallenged, if the

Dunkleys were correct in saying that 75% of the pack was peeled by this very machine the preceding year. Things like this do not happen. On the other hand, this article fits in appropriately with the story told by the Dunkley-Norton correspondence.

Perhaps no one was in a better position to know just what happened in 1903 and 1904 than Arthur W. Norton. He was the son of Edwin Norton, the financial backer of Dunkley, and was at the Dunkley factory at South Haven each year, ostensibly as an employe, doubtless in fact to look after his father's extensive interests there. He was an intimate associate of Melville Dunkley.

This brings us to the last item of new matter under the grouping we are considering, namely:

#### 7. Arthur W. Norton Testimony.

Arthur W. Norton, who is vice-president of the Continental Can Co., lives at Baltimore, Md. Until he read the Dunkley-Norton letters, the sequence of events at South Haven was not clear to him. Upon reading these letters, however, events became clear, and he remembers and has made, and there is now before this court, his affidavit in which he states directly and positively that "the model or experimental machine without any lye tank was built in the fall of 1903; that it was successfully tried out on late peaches; the following year the lye tank and a three-line peach-peeling machine were constructed, installed and used for the first time in the season of 1904." (Rec. on App. 206-215.) He identifies a photograph of Exhibit

10, the framework of the model experimental machine as the framework of the machine referred to by him as having been constructed and tried out in 1903. His testimony, of course, conflicts directly with the story told by the Dunkleys at San Francisco.

If the facts disclosed by the Dunkley payrolls, the April 22, 1904, newspaper article and the Arthur W. Norton affidavit be brought into the suppositional case we have mentioned, can there be any doubt as to the result? There is nothing left of the Dunkley story as given at the San Francisco trial. The basis of the startling change of testimony there from their Patent Office testimony is destroyed. The only documentary proof relied upon by the Dunkleys is eliminated. Their excuse for the non-production of books and records is gone. The long hand-peeling table, the construction and use of which in 1903 is utterly inconsistent with their story, is brought in. Essential features of their story are broken by the contemporaneous Dunkley-Norton correspondence. The article in the South Haven paper is utterly inconsistent with essential features of their story, and lastly, Arthur W. Norton testifies that the model machine was built in the fall of 1903 and tried out on late peaches, and that the commercial machine was built the following winter, and that the first commercial use of the lye peeling machine occurred in 1904. *If the many decisions announcing the burden of proof in such cases mean anything at all, they mean that a patentee cannot ante-date his patent by any such showing as this.*

(c) **New Matter Set up In Paragraph IV of the Petition—Diligence in Its Presentation.**

In considering the question of diligence, two queries suggest themselves:

1. Could or should this new matter have been presented at the trial at San Francisco?
2. Are petitioners in time in presenting it here?

The changes in testimony by the two Dunkleys, of course, could not have been presented when these cases were tried. The changes were not made until long afterwards. The Dunkley-Norton letters and the Dunkley payrolls came to light long after the trial. Melville Dunkley, at San Francisco, testified that all records were lost or destroyed. No rule of diligence of which we have ever heard would require a party to present records in the possession of his adversary which such adversary testified had been destroyed. The newspaper article of April 22, 1904, was not discovered until long after the trial. Could it have been discovered before? Counsel for defendants in the Los Angeles and New York cases made most exhaustive searches for any such an article at newspaper offices, public libraries and even at the homes of persons represented to have kept old papers, and neither the 1904 file of the paper or the issue containing the article was at any of these places (Record on Appeal 67, Pet. 37-8), which answers the query. A search for it before the trial would have been unavailing. Arthur W. Norton might have been located and his testimony taken. His testimony, however, would not have helped. It

was only after he had read the correspondence passing between his father and his uncle on one side and S. J. Dunkley on the other, that his memory was refreshed and the sequence of events at South Haven became clear to him, so that he could remember and was able to testify to the facts stated in his affidavit (Pet. 39.) These letters were not unearthed until long after the trial. Hence it is clear as to the new matters grouped under paragraph IV, there was no lack of diligence.

As to the presentation here of these matters, but a word seems necessary. There is no definite time limit on applications of this character.

*National Brake and Electric Co. v. Christensen*,  
254 U. S. 425, 65 L. Ed.—(January 3, 1921).

*John Simmons v. The Grier Bros. Co.*, decided  
by Supreme Court February 27, 1922.

*Barber v. Otis Motor Sales Co.*, 271 Fed. 171, C.  
C. A. Second Circuit, (February 9, 1921).

*In re Gamewell Fire-Alarm Tel. Co.*, 73 Fed.  
908, *supra*.

Laches implies prejudice. The decrees sought to be reviewed here are interlocutory. There has been no accounting. The taking of an account has been allowed to drag.

Aside from this, the petition shows that these petitioners have sought diligently, though unsuccessfully, to open up these decrees. Before the trial of the Los Angeles case and immediately upon discovering that the plaintiff at San Francisco had parted with its title prior to judgment there, they rushed to this court



seeking relief upon this score, and as an equitable backing to their application, pointed out in very brief general terms what they believed would be developed at the approaching Los Angeles trial as to the underlying merits of the controversy. They were wrong in this effort, and this court promptly denied them relief, and remanded to the lower court the determination of the effect of the assignment of patent. Both sides then awaited the termination of the Los Angeles case. Then plaintiff below sought to get its assignee into the case. The petitioners sought to get the case opened up for the reception of the new evidence brought to light at the Los Angeles trial, both as a condition upon the assignee being admitted as a party, and also by a motion that the lower court ask this court for permission to reopen. The whole matter dragged at the instance of the judge of the lower court, who desired to await the decision of this court on appeal in the Los Angeles case. Finally failing to get relief in the lower court, the petitioners have come here. Efforts, though ineffective, to secure relief, show diligence and tend to negative laches. (*Southern Pacific Co. v. Bogert*, 250 U. S. 483, 63 L. Ed. 1099.)

### III. New Matter Grouped Under Paragraph VII of Petition.

It is our view that it is unnecessary for this court to consider this except as it bears on the underlying equity of these applications. If we are wrong in this,

then the questions of materiality of the new matter and diligence in its presentation arise.

(a) Materiality.

The materiality of this evidence has been vouched for by Judges Trippet and Hand. Nearly all of it has been before this court on appeal from Judge Trippet's decision. It was then fully argued, both orally and in briefs on file. Judge Trippet's decision was affirmed. The evidence is referred to with considerable definiteness in the petition. Many references to the record are there made. The general effect of the new evidence has been heretofore stated herein. To say more now on this point would seem to be a work of supererogation.

(b) Diligence.

Should this matter have been presented at the trial? The reason why none of this evidence was presented at the trial is stated in the affidavit of William K. White, counsel for defendants at San Francisco, and the person in charge of the preparation and presentation of the case there. See Appeal Rec. pp. 269-277.

Does this excuse the non-production of this evidence? The rule in regard to diligence in such matters should be given a common sense application. If counsel for the petitioners at the San Francisco trial did all that a prudent and careful practitioner would have done under the same circumstances, these petitioners should not now be penalized because he did not do more.

Surely Mr. White, in preparing the case, was justified in assuming that the two Dunkleys would not retract testimony given by them in 1910. This being so, he was not chargeable with lack of reasonable diligence in failing to look for and present a mass of evidence to show that the Dunkleys did not build the first model machine in 1902, nearly a year earlier than they had specifically given in 1910 in the Patent Office proceedings, as the date of its construction.

What has already been said as to the timeliness of the presentation of these matters set out in paragraph IV of the petition before this court, applies with equal force to the matters in paragraph VII.

In any event the lack of diligence is merely a matter for the assessment of *terms*.

*Barber v. Otis Motor Sales Co.*, 245 Fed. 945.

## V. Decision of Judge Van Fleet on Petitioners' Applications That He Request This Court for Permission to Reopen.

This decision and its effect is considered to some extent in the brief on appeal from his decision rendered at the same time on the motion of the old Dunkley Company to add the new Dunkley Co. as a party.

The fact that Judge Van Fleet refused to make the request does not in any way affect the right of the petitioners, under *National Brake & Electric Co. v. Christensen*, *supra*, to come here with these applications. No appeal lies directly from his order refusing to make the request. Except as his action may be

deemed involved in his other order, these petitioners have no way in which to secure the views of this court upon the materiality of the new matter now available, except by these applications. As to the *weight* to be given his decision, we call attention to the following:

1st. Judge Van Fleet entirely misconceived the rule as to where the burden of proof rested. He was, it is apparent, of the opinion that the burden of proof rested upon the defendants in the original trial, *to show that Dunkley was after Grier, by clear and convincing proof*. The reverse of this obtains, under an unbroken line of authorities. *It was for the Dunkleys to show that they were before Grier by such proofs*. The cases cited by him are applicable to the Dunkleys, and not to these petitioners. *Symington v. Nat. Malleable Casting Co.*, 250 U. S. 383-6, 63 L. Ed. 1045, and the *Barbed Wire case*, 155 U. S. 286, 300, weigh against the Dunkleys and not against these petitioners who did establish the Grier dates by the kind of proof required to establish an anticipation. Had he not thus gotten the rule as to burden of proof turned about, it seems incredible that he could have reached the conclusion he did.

2nd. He fell into the error of thinking Judges Trippet and Hand based their decisions upon Stewart Campbell's testimony. As we have pointed out before, Stewart Campbell played a very unimportant part in the subsequent trials. His testimony could have been entirely eliminated, and the situation would not have been changed. We think it is reasonably clear

that Judge Trippet's references to Campbell were with a view of correcting an injustice that was done him by prior decisions. The testimony of many witnesses did show that he was a truthful but perhaps unprepossessing witness. We again direct the court's attention in this connection to the statement heretofore made of the Dunkley story as established by the new evidence. The court will observe that no reference is there made to Campbell's testimony, but that his connection with the various events is proven by the testimony of numerous disinterested witnesses.

For these two reasons, if none other, we respectfully submit that this court, in passing upon the question of the materiality of the new matter here presented, should not be influenced by this decision.

### **Dunkley Has Contributed Nothing to the Art. Patent Void for Other Reasons.**

It is our earnest contention that S. J. Dunkley has never contributed anything to the peach peeling art. The Dunkley machine, regardless of its date, was never a success. It consisted principally of a set of bristle brushes. The system of peeling, as practiced by Dunkley, was to subject the peaches to the lye *prior* to halving and pitting them. This required the impossible performance of halving these peaches subsequently by hand, or the making of another machine to automatically extract the pits therefrom. These so-called "pitting machines" were also failures, for the reason that the peaches were necessarily mutilated by the use of them. The uncontradicted testimony is that Dunkley



himself is the only person who ever used the Dunkley machines commercially (with the possible exception of one small plant somewhere in Michigan) and Dunkley went out of the canning business in 1908. These machines were brought to the coast in 1905, and tried out by the California Fruit Cannery Association, and were found to be failures.

*The secret of the success of the lye peeling machines lies in splitting and pitting the peaches FIRST, so that the handling of the slick lye-treated peaches is avoided.* This was discovered by Pyle in 1901, and by Grier, Roach and Vernon in 1902.

With respect to the so-called "peeling jet," it may be stated that it developed in the trial of the Los Angeles and New York cases (L. A. Rec. pp. 2887-8) that Dunkley did not install a pump to assist the pressure until 1905, dependence being had upon both water and brushes, as held by the Patent Office. If, therefore, a "peeling jet" is the essence of the Dunkley invention, his machine was anticipated regardless of the truth or falsity of his testimony here.

Furthermore the patent is void in not setting out the amount of the pressure required. (*Williamette Iron & Steel Works v. Columbia Eng. Works*, 252 Fed. 594, 596, C. C. A. 9; *The Incandescent Lamp Patent*, 159 U. S. 464, 474.) *It will be noted that the patent does not specify the amount of pressure to be used.*

The machine which Dunkley now manufactures is a pirated machine. It has no brushes; it bears no resemblance to the machine of the patent whatever. It

is modeled after the Grier, Beekhuis and Monte types of machine. Dunkley's alleged invention is a "paper" one. He demands an oppressive monopoly without a single contribution to the art. He has taught the great peach peeling industry of this country nothing. The object of the patent law is to encourage the conception and disclosure of inventions by giving the monopoly to the first and original inventor. These laws were not intended as instruments of injustice, nor were they designed to shield and protect one who is not the first inventor, giving to him oppressive privileges to which he is not truly entitled.

### Conclusion.

Defendants having established conception and reduction to practice by Grier at dates prior to Dunkley's application for patent, the burden of proof shifted to plaintiff to show earlier dates than Grier by proof "beyond a reasonable doubt" or at least, by a "very clear and convincing" evidence.

As the record now stands not only has the plaintiff failed to sustain this burden, but defendants have affirmatively shown by overwhelming evidence that Dunkley (or Campbell) did not conceive his alleged invention until late in August, 1903, and that it was not reduced to practice by the completion of the experimental model machine until after October 6, 1903, dates subsequent to those of Grier. In the case at bar we have approximately fifty witnesses whose testimony was introduced in the Pasadena and New York cases, contradicting the testimony of plaintiff as to

the date of invention. Under the decisions it is only necessary to create a doubt in the mind of the court as to the prior date claimed by the inventor. In the Pasadena case, however, Judge Trippet was so clear on this issue that he found

“The first or model machine ever built by Dunkley to peel peaches by the lye process was built in the autumn of 1903 and no machine at all was built in 1902. The evidence heretofore stated tends strongly to prove that the Dunkley conception was not made until the summer of 1903 and that Mr. Dunkley is wrong in his claim of the conception at a prior date.”

He added:

“It seems proper to say that the evidence convinces the court of the above conclusion beyond a reasonable doubt.”

The fact that a trial court, after listening to the testimony embraced in this voluminous record, and having had the benefit of viewing the witnesses upon the stand, came to the positive conviction above quoted, and that subsequently another trial judge upon the same record found similarly, ought of itself, it seems to us, be sufficient to create that element of doubt which now as a matter of law brings the case at bar within the rule.

We most earnestly submit that the petitions of plaintiffs herein for leave to file in the court below original bills in the nature of bills of review should be granted.

Respectfully submitted,

KEMPER B. CAMPBELL,  
WILLIAM J. CARR,  
FREDERICK S. LYON,  
FRANCIS J. HENNEY,  
*Counsel for Petitioners.*